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Attorneys for Plaintiff and Chapter 7 Trustee
E. LYNN SCHOENMANN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re
THE ELITE CAFÉ, INC.,
Debtor.

Case No. 06-31144 TC
Chapter 7

E. LYNN SCHOENMANN, Trustee,
Plaintiff,
v.
THOMAS CLENDENING,
Defendant.

A.P. No.

COMPLAINT FOR:

- (1) AVOIDANCE AND RECOVERY OF
FRAUDULENT TRANSFER;**
**(2) RETURN OF IMPROPER
SHAREHOLDER DISTRIBUTION; AND**
(3) OBJECTION TO CLAIM

E. Lynn Schoenmann, Chapter 7 trustee, alleges:

JURISDICTIONAL ALLEGATIONS

1. This is an adversary proceeding brought pursuant to Federal Rule of Bankruptcy Procedure 7001 et seq. and sections 323, 502, 541, 544, 548 and 550 of the Bankruptcy Code.
2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.

1 3. Venue is proper pursuant to 28 U.S.C. § 1409.

2 4. This adversary proceeding is a core proceeding as that term is defined at 28 U.S.C.
3 § 157(b)(2)(A), (B), (H) and (O).

4 5. This Court may enter a final judgment herein, subject to review by the United
5 States District Court under 28 U.S.C. § 158.

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7 **GENERAL ALLEGATIONS**

8 6. On or about December 1, 2006 (the “Petition Date”), The Elite Café, Inc.
9 (“Debtor”) filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the United States
10 Bankruptcy Court for the Northern District of California, San Francisco Division (the
11 “Bankruptcy Court”).

12 7. Plaintiff E. Lynn Schoenmann (“Trustee”), is the duly appointed, qualified and
13 acting chapter 7 trustee of the Debtor’s bankruptcy estate.

14 8. The Trustee is informed and believes, and based thereon alleges, that the Debtor is
15 a corporation organized under the laws of the State of California.

16 9. The Trustee is informed and believes, and based thereon alleges, that defendant
17 Thomas Clendening (“Defendant”) is, and at all times relevant was, an individual domiciled in
18 the State of California.

19 10. The Trustee is informed and believes, and based thereon alleges, that Defendant is,
20 and at all times relevant was, the Debtor’s president and a 40% shareholder of the Debtor.

21 11. The Trustee is informed and believes, and based thereon alleges, that Defendant is
22 an insider of the Debtor, as that term is defined at 11 U.S.C. § 101(31).

23 12. The Trustee is informed and believes, and based thereon alleges, that on or about
24 November 3, 2005, SKK Restaurant Group, LLC purchased substantially all of the Debtor’s
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1 assets for \$502,000.00 in cash and a promissory note in the amount of \$60,000.00, hereafter
2 referred to as the "Asset Sale."

3 13. The Trustee is informed and believes, and based thereon alleges, that Defendant
4 received approximately \$203,585.06 of the cash proceeds from the Asset Sale, or such other
5 amount as determined according to proof, hereafter referred to as the "Transfer."
6

7 **FIRST CLAIM FOR RELIEF**
8 **(Avoidance of Fraudulent Transfer)**
9 **[11 U.S.C. § 548(a)(1)(B)]**

10 14. The Trustee incorporates by this reference and realleges each of the foregoing
11 paragraphs of this Complaint.

12 15. The Trustee is informed and believes, and based thereon alleges, that the Transfer
13 was made within two years of the Petition Date.

14 16. The Trustee is informed and believes, and based thereon alleges, that Debtor did
15 not receive reasonably equivalent value in exchange for the Transfer.

16 17. The Trustee is informed and believes, and based thereon alleges that:

17 (I) Debtor was insolvent on the date that the Transfer was made, or became
18 insolvent as a result of the Transfer, and/or

19 (II) Debtor was engaged in a business or a transaction, or was about to engage
20 in business or a transaction, for which any property remaining with Debtor was an unreasonably
21 small capital; and/or
22

23 (III) Debtor intended to incur, or believed that it would incur, debts that would
24 be beyond its ability to pay as such debts matured; and/or

25 (IV) The Transfer was made to or for the benefit of Defendant, an insider of the
26 Debtor, pursuant to an employment contract and not in the ordinary course of business.

27 18. Pursuant to 11 U.S.C. § 548, the Trustee may avoid the Transfer.
28

1 **WHEREFORE**, the Trustee prays for judgment as hereinafter set forth.

2 **SECOND CLAIM FOR RELIEF**
3 **(Avoidance of Fraudulent Transfer)**
4 **[11 U.S.C. § 544; Civil Code § 3439.04(a)(2)]**

5 19. The Trustee incorporates by this reference and realleges each of the foregoing
6 paragraphs of this Complaint.

7 20. The Trustee is informed and believes, and based thereon alleges, that Debtor did
8 not receive reasonably equivalent value in exchange for the Transfer.

9 21. The Trustee is informed and believes, and based thereon alleges, that at the time of
10 the Transfer, (A) Debtor was engaged or was about to engage in a business or transaction for
11 which the remaining assets of Debtor were unreasonably small in relation to the business or
12 transaction, and/or (B) Debtor intended to incur, or believed or reasonably should have believed
13 that it would incur, debts beyond its ability to pay as they became due; and as such, the Transfer
14 is avoidable pursuant to California Civil Code § 3439.04(a)(2).
15

16 22. Pursuant to 11 U.S.C. § 544(b), the Trustee may avoid the Transfer.

17 **WHEREFORE**, the Trustee prays for judgment as hereinafter set forth.

18 **THIRD CLAIM FOR RELIEF**
19 **(Avoidance of Fraudulent Transfer)**
20 **[11 U.S.C. § 544; Civil Code § 3439.05]**

21 23. The Trustee incorporates by this reference and realleges each of the foregoing
22 paragraphs of this Complaint.

23 24. The Trustee is informed and believes, and based thereon alleges, that Debtor did
24 not receive reasonably equivalent value in exchange for the Transfer.

25 25. The Trustee is informed and believes, and based thereon alleges, that at the time of
26 the Transfer, Debtor was insolvent or became insolvent as a result of the Transfer, and that the
27 Transfer is avoidable pursuant to California Civil Code § 3439.05.
28

1 26. Pursuant to 11 U.S.C. § 544(b), the Trustee may avoid the Transfer.

2 **WHEREFORE**, the Trustee prays for judgment as hereinafter set forth.

3 **FOURTH CLAIM FOR RELIEF**
4 **(Recovery of Avoided Transfer)**
5 **[11 U.S.C. § 550]**

6 27. The Trustee incorporates by this reference and realleges each of the foregoing
7 paragraphs of this Complaint.

8 28. The Trustee may avoid the Transfer pursuant to 11 U.S.C. §§ 544(b) and 548.

9 29. Accordingly, the Trustee may recover the amount of at least \$203,585.06 from
10 Defendant, in addition to such other amounts as are established according to proof, for the benefit
11 of the Debtor's bankruptcy estate pursuant to 11 U.S.C. § 550(a).

12 **WHEREFORE**, the Trustee prays for judgment as hereinafter set forth.

13 **FIFTH CLAIM FOR RELIEF**
14 **(Return of Improper Shareholder Distribution)**
15 **[Cal. Corp. Code §§ 501, 506; 11 U.S.C. §§ 323, 541]**

16 30. The Trustee incorporates by this reference paragraphs 1 through 13 of the
17 Complaint, inclusive, as if set forth in full herein.

18 31. The Trustee is informed and believes, and based thereon alleges, that the Debtor
19 made the Transfer to Defendant as a distribution on account of Defendant's status as a
20 shareholder of the Debtor.

21 32. The Trustee is informed and believes, and based thereon alleges, that as a result of
22 the Transfer, the Debtor was, or was likely to be, unable to meet its liabilities as they matured.

23 33. The Trustee is informed and believes, and based thereon alleges, that the Transfer
24 was made in violation of California Corporations Code §§ 501 and 506.

25 34. As the representative of the Debtor's estate, the Trustee may recover the Transfer
26 pursuant to California Corporations Code § 506.
27
28

1 **WHEREFORE**, the Trustee prays for judgment as hereinafter set forth.

2 **SIXTH CLAIM FOR RELIEF**
3 **(Objection to Claim)**
4 **[11 U.S.C. § 502(d)]**

5 35. The Trustee incorporates by this reference and realleges paragraphs 1 through 29
6 of this Complaint, inclusive, as if set forth in full herein.

7 36. The Trustee is informed and believes, and based thereon alleges, that Defendant
8 may file a proof of claim in the Debtor's bankruptcy case.

9 37. Each and every claim of Defendant herein should be disallowed to the extent that
10 Defendant has not surrendered the Transfer, which is avoidable under the above claims for relief,
11 but without limitation as to any and all other grounds of disallowance not presently known to the
12 Trustee but that may be established according to proof.

13 **WHEREFORE**, the Trustee prays for the following relief:

14 **PRAYER**

15 **FIRST THROUGH FOURTH CLAIMS FOR RELIEF**

16 38. For entry of judgment avoiding the Transfer, or such other amount as established
17 according to proof, pursuant to 11 U.S.C. §§ 544(b) and 548, and California Civil Code §§
18 3439.04(a)(2) and 3439.05;
19

20 39. For judgment in the sum of at least \$203,585.06, or such other amount as
21 established according to proof;
22

23 40. For an order directing payment thereof by Defendant to the Trustee;

24 **FIFTH CLAIM FOR RELIEF**

25 41. For entry of judgment directing Defendant to return the amount of the Transfer, or
26 such other amount as determined according to proof, to the Trustee pursuant to California
27 Corporations Code §§ 501 and 506.
28

1 42. For judgment in the sum of at least \$203,585.06, or such other amount as
2 established according to proof;

3 **SIXTH CLAIM FOR RELIEF**

4 43. For entry of judgment disallowing any and all of Defendant's claim(s) herein until
5 and unless the amount of the Transfer, together with all interest accruals thereupon, have been
6 surrendered to the Trustee;
7

8 **FOR ALL CLAIMS FOR RELIEF**

9 44. For interest on all sums at the legal rate from the date of the Transfer;

10 45. For all costs of suit incurred herein; and

11 46. For such other and further relief as the Court deems proper.
12

13 Dated: March 21, 2007

DUANE MORRIS LLP

14 By: /s/ Geoffrey A. Heaton (206990)

15 GEOFFREY A. HEATON

16 Attorneys for Plaintiff and Chapter 7 Trustee

17 E. LYNN SCHOENMANN
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